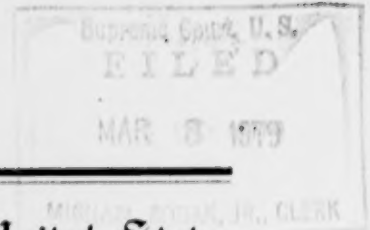


No. 78-948



In the Supreme Court of the United States

OCTOBER TERM, 1978

ANTHONY TINGHINO, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT*

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

WADE H. MCCREE, JR.
*Solicitor General
Department of Justice
Washington, D.C. 20530*

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-948

ANTHONY TINGHINO, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT*

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner and co-defendant Tucker were convicted of conspiracy to devise a scheme to defraud through the use of arson, and of mail fraud and use of interstate facilities in furtherance of this scheme, in violation of 18 U.S.C. 371, 1341, and 1952. Petitioner and his co-defendant were each sentenced to three years' imprisonment on the conspiracy count and placed on probation for three years on each of the remaining counts. The court of appeals affirmed (Pet. App. 1a-6a).

The evidence at trial, as the court of appeals stated (Pet. App. 2a), showed that petitioner and his co-defendant

established businesses, obtained inflated invoices for ordered merchandise, secured insurance, and then

arranged for a fire to destroy the premises. Insurance companies paid money in settlement of at least three claims that resulted from fires set pursuant to the scheme. [Petitioner] was the public fire insurance adjuster in each claim.

Petitioner contends (Pet. 17-19) that the district court's denial of his motion to sever his trial from Tucker's "violates the spirit" of *Bruton v. United States*, 391 U.S. 123 (1968), and conflicts with *United States v. Johnson*, 478 F. 2d 1129 (5th Cir. 1973), because the defenses of petitioner and Tucker were so inconsistent that petitioner was denied a fair trial (Pet. 8-9, 17-20).

The district court's denial of petitioner's severance motion does not conflict with *United States v. Johnson, supra*. In that case, a co-defendant (Smith) admitted committing the acts charged but claimed that he was merely a government informer and that defendant Johnson was present when the acts were committed (and had in fact arranged for their commission). Johnson's defense was that he was not present when the crimes were committed. The court of appeals found that Johnson's theory of defense was "completely antagonistic to that of his co-defendant Smith" and that the district court had been adequately apprised of this antagonism prior to trial. *United States v. Johnson, supra*, 478 F. 2d at 1131. The Fifth Circuit concluded that, in failing to grant Johnson's severance motion, the district court had abused its discretion.

That result is of no help to petitioner here. His defense was that he was merely doing his job as a fire adjuster (Pet. 8); Tucker's defense was that he, Tucker, was a government informant (S. Tr. 14-18). After reviewing the record in this case, the court of appeals concluded (Pet. App. 3a) that whatever inconsistencies existed between the two theories of defense did not deny petitioner a fair

trial. Although petitioner contends that the court of appeals should have concluded otherwise (Pet. 18-19), he does not take issue with the standard the court applied and there is no reason for this Court to review the court of appeals' fact-bound determination.¹

Finally, petitioner contends (Pet. 19-20) that introduction of evidence that he had bribed police officers was improper. It is apparent, however, that petitioner's objection is not so much to the introduction of evidence² but to the questions of Tucker's counsel suggesting that petitioner may have been bribing policemen (see Pet. 10-16). The district court cautioned Tucker's counsel not to go any further into the matter (Tr. 219) but denied petitioner's motion for a severance or mistrial (*ibid.*). The district court also told petitioner's counsel that objections to questions would be considered waived unless made at the time the questions were asked (*ibid.*). These routine decisions of trial administration do not warrant this Court's attention.

¹Nor did the opening statement of Tucker's counsel violate *Bruton v. United States, supra*. Arguments of counsel are not evidence, as the jury was instructed (Tr. 1470); *Bruton*, therefore, has no application here. In any event, Tucker's counsel properly limited his opening statement (see S. Tr. 12-19) to what "I think the evidence is going to show you [i.e., the jury]" (S. Tr. 13, 14, 15, 16, 17, 18) and petitioner did not object to it.

²The only evidence that petitioner apparently finds objectionable is a statement by a participant in the arson scheme that he had told a grand jury "of criminal conduct other than the criminal conduct [he had] already testified to." See Pet. 10-11. This vague reference to other misconduct, if it is objectionable at all, did not warrant reversal of petitioner's conviction, as the court of appeals held (Pet. App. 4a).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

MARCH 1979